



9110-04-P

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

### **33 CFR Part 165**

**[Docket Number USCG-2019-0123]**

### **RIN 1625-AA00**

### **Safety Zone; Lower Mississippi River, Ohio River, and Upper Mississippi River, Bird's Point-New Madrid Floodway**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a temporary safety zone for all navigable waters of the Lower Mississippi River from mile marker (MM) 953.8 to MM 887.0, the Upper Mississippi River from MM 0.0 to MM 3.0, and the Ohio River from MM 981.5 to MM 978.5. This action is necessary to protect persons, property, and infrastructure from potential damage and the safety hazards associated with the demolition of federal levees on the Lower Mississippi River and utilization of the Bird's Point-New Madrid Floodway. This proposed rulemaking would prohibit the entry of vessels or persons into this temporary safety zone unless specifically authorized by the Captain of the Port Sector Ohio Valley (COTP) or a designated representative.

**DATES:** Comments and related material must be received by the Coast Guard on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by docket number USCG-2019-

0123 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email MST2 Dylan Caikowski, MSU Paducah, U.S. Coast Guard; telephone 270-442-1621 ext. 2120, email STL-SMB-MSUPaducah-WWM@uscg.mil.

## **SUPPLEMENTARY INFORMATION:**

### **I. Table of Abbreviations**

CFR	Code of Federal Regulations
COTP	Captain of the Port Sector Ohio Valley
DHS	Department of Homeland Security
FR	<i>Federal Register</i>
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

### **II. Background, Purpose, and Legal Basis**

The purpose of this rulemaking is to ensure the safety of vessels on the navigable waters of the Lower Mississippi River, Upper Mississippi River, and Ohio River during high water event. The United States Army Corps of Engineers may deem it necessary to demolish certain federal levees on the Lower Mississippi River and utilize the Bird’s Point-New Madrid Floodway, to maintain the integrity of the Lower Mississippi River, Upper Mississippi River, Ohio River, and all associated tributaries. During this time, a temporary safety zone on the Lower Mississippi River, Upper Mississippi River, and Ohio River would be necessary to protect persons, property, and infrastructure from potential damage and safety hazards associated with the demolition of federal levees on

the Lower Mississippi River and utilization of the Bird's Point-New Madrid Floodway. The Captain of the Port Sector Ohio Valley (COTP) has determined that potential hazards associated with the demolition of the federal levees on the Lower Mississippi River and re-stabilization of the waterway would be a safety concern for anyone in the vicinity of the Lower Mississippi River from mile marker (MM) 953.8 to MM 887.0, the Upper Mississippi River from MM 0.0 to MM 3.0, and the Ohio River from MM 981.5 to MM 978.5. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

### **III. Discussion of Proposed Rule**

The COTP proposes to establish a temporary safety zone on all navigable waters of the Lower Mississippi River from MM 953.8 MM 887.0, the Upper Mississippi River from MM 0.0 to MM 3.0, and the Ohio River from MM 981.5 to MM 978.5, in the event of the demolition of the federal levees on the Lower Mississippi River and utilization of the Bird's Point-New Madrid Floodway. The COTP or a designated representative would inform the public of the enforcement date and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone through Local Notices to Mariners (LNMs), and/or actual notice.

No vessels or persons would be permitted to enter the proposed safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

### **IV. Regulatory Analyses**

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of

protestors.

#### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the temporary safety zone. The safety zone would only impact a relatively small portion of the waterway and would only be in effect during the demolition process and approximately 36 hours after to allow for stabilization of the waterway. After approximately 36 hours, vessels would be allowed to transit. Additionally, the safety zone would be limited to the high water event if the U.S. Army Corps of Engineers deems it necessary to demolish the federal levees on the Lower Mississippi River and utilize the Bird’s Point-New Madrid Floodway.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast

Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the temporary safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### *E. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### *F. Environment*

We have analyzed this proposed rule under Department of Homeland Security Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have made a preliminary determination that this action is one of a category of

actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone on all waters of the Lower Mississippi River from MM 953.8 to MM 887.0, the Upper Mississippi River from MM 0.0 to MM 3.0, and the Ohio River from MM 981.5 to MM 978.5, during demolition of the federal levees on the Lower Mississippi River and utilization of the Bird's Point-New Madrid Floodway. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

#### V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, visit <https://www.regulations.gov/privacyNotice>.

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

### **List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

### **PART 165-REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

1. The authority citation for part 165 continues to read as follows:

**Authority:** 46 U.S.C. 70034; 46 U.S.C. 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T846 to read as follows:



§ 165.T846 Safety Zone; Lower Mississippi River, Ohio River, and Upper Mississippi River, Bird's Point-New Madrid Floodway

(a) Location. The temporary safety zone will encompass all waters of the Lower Mississippi River from mile marker (MM) 953.8 to MM 887.0, the Upper Mississippi River from MM 0.0 to MM 3.0, and the Ohio River from MM 981.5 to MM 978.5.

(b) Regulations. (1) In accordance with the general regulations in §165.23, entry into, transiting, or anchoring within this temporary safety zone is prohibited unless authorized by the Captain of the Port Sector Ohio Valley or a designated representative.

(2) To seek permission to enter, contact the Captain of the Port Sector Ohio Valley or a designated representative by radio VHF-FM Channel 16 or via phone at 502-779-5422. Those in the safety zone must comply with all lawful orders or directions given to them by the Captain of the Port Sector Ohio Valley or a designated representative.

(c) Enforcement period. The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone through Local Notices to Mariners (LNMs), and/or actual notice.

Dated: March 14, 2019

M. B. Zamperini,  
CAPTAIN, U.S. Coast Guard,  
Captain of the Port Sector Ohio Valley.  
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